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No. 99-916

In the Supreme Court of the United States

ENRON POWER MARKETING, INC., PETITIONER

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON PETITIONER'S SUGGESTION OF MOOTNESS AND MOTION TO VACATE

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the court of appeals should be vacated as moot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 176 F.3d 1090. The orders of the Federal Energy Regulatory Commission (Pet. App. 12a-43a) are reported at 83 F.E.R.C. ¶ 61,098, 83 F.E.R.C. ¶ 61,338, and 84 F.E.R.C. ¶ 61,128.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999, and amended on July 20, 1999. Petitions for rehearing were denied on September 1, 1999 (Pet. App. 281a-282a). The petition for a writ of certiorari was filed on November 30, 1999. Petitioner invokes the

Court's jurisdiction under 28 U.S.C. 1254(1). As discussed below, this Court now lacks jurisdiction to review the merits of petitioner's claim, because the case became moot while the petition was pending in this Court.

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 792 *et seq.*, confers upon the Federal Energy Regulatory Commission (FERC or Commission) jurisdiction over all rates, terms and conditions of electric transmission service provided by public utilities in interstate commerce. Section 201(b)(1) of the FPA specifically extends the Commission's jurisdiction "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Jurisdiction over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce is left to the States. *Ibid.*

Pursuant to Section 205(c) of the Act, 16 U.S.C. 824d(c), public utilities subject to FERC's jurisdiction are required, "[u]nder such rules and regulations as the Commission may prescribe," to file tariff schedules showing their rates and service terms, along with related contracts for jurisdictional service. Section 206 of the Act, 16 U.S.C. 824e, prohibits such utilities from engaging in undue discrimination.

2. In recent years, the electric utility industry has been evolving from a traditional, heavily regulated industry dominated by vertically integrated monopolies into a competitive industry in which wholesale customers have choices as to their power suppliers. A key impediment to developing a competitive wholesale market for electric power is the monopoly ownership of

interstate transmission systems: a utility that controls access to transmission services can deny market access to competitors and favor its own generation in competing for buyers. FERC's efforts to address that problem underlie this and related cases.

a. In Order No. 888, currently on review in the District of Columbia Circuit,[1] the Commission found, on the basis of an extensive rulemaking record, that public utilities under its jurisdiction had engaged in undue discrimination by denying to others interstate transmission services that the utilities had provided themselves. The Commission undertook to end that discrimination. Order No. 888 thus requires public utilities to provide their transmission customers service comparable to what they provide themselves in using their own transmission systems to serve their own power customers. Invoking its authority under Sections 205 and 206 of the Act, 16 U.S.C. 824d, 824e, the Commission prescribed the terms and conditions of service necessary to accomplish that objective. Those terms and conditions are set out in a *pro forma* (*i.e.*, generally applicable) tariff.

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. Statutes. & Regs. ¶ 31,036, clarified, 76 F.E.R.C. ¶ 61,009 (1996), and 76 F.E.R.C. ¶ 61,347 (1996), modified, Order No. 888-A, 3 F.E.R.C. Statutes & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), petitions for review pending *sub nom. Transmission Access Policy Study Group* v. *FERC*, Nos. 97-1715, et al. (D.C. Cir. argued Nov. 3, 1999) (TAPSG). We have lodged with the Clerk of this Court a copy of FERC's brief in TAPSG.

Under the *pro forma* tariff, utilities must take transmission service for their own wholesale power sales and for certain retail power sales on the same rates, terms, and conditions they offer to others. Order No. 888, *supra*, at 31,746. All public utilities that own or control transmission facilities are required to file "open access" tariffs conforming to the *pro forma* tariff. A utility is permitted to file proposals to change its *pro forma* tariff provisions, provided that it demonstrates that the changes are consistent with, or superior to, the provisions of the *pro forma* tariff. *Id.* at 31,770; Order No. 888-A, *supra*, at 30,332.

b. Order No. 888 and its *pro forma* tariff set forth the rules under which public utilities that own, operate, or control interstate transmission facilities are to provide transmission service to all eligible transmission service buyers and sellers. As relevant here, the *pro forma* tariff specifies criteria for the "curtailment" of transmission service: *i.e.*, the "reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions." Order No. 888-A, *supra*, at 30,507-30,508. The *pro forma* tariff requires that curtailments be made

> on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint. If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-to-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers.

Id. at 30,517.

In adopting this curtailment provision, the Commission addressed concerns that the requirements for nondiscriminatory curtailment would harm the transmitting utility's "native load" customers, *i.e.*, those customers, who may be wholesale customers or retail customers, to whom the utility sells power within its service territory and whose electric energy needs the utility has a regulatory or contractual obligation to meet. The Commission made clear that it was not requiring a *pro rata* curtailment of all transmission at the time of a constraint, but only those transactions that effectively relieve the constraint. Order No. 888-A, *supra*, at 30,278-30,279; Pet. App. 271a. Further, as to reliability for native load, the Commission stressed that the transmission provider would remain responsible for planning and maintaining sufficient transmission capacity and would be permitted to reserve that capacity to serve its native load safely and reliably while offering open access transmission to others under Order No. 888. Order No. 888-A, *supra*, at 30,279; Pet. App. 271a.

c. During the course of the Order No. 888 rulemaking, the Commission addressed several issues concerning the scope of its jurisdiction over interstate transmission in light of the Act's provisions giving the States jurisdiction over local distribution and retail sales of electric energy. Among those issues was whether federal authority extended to the interstate transmission component of an electric utility's sale of power to its retail customers. As the Commission recognized, a growing number of States are permitting or requiring utilities that provide retail service to "unbundle" their services so that customers can shop for power from sources other than their historical suppliers. Such unbundling, in turn, required the

Commission to determine which transmission facilities and services would be subject to Order No. 888's non-discriminatory tariff.

The Commission resolved that jurisdictional question as follows: If the interstate transmission service is provided separately and apart from the retail sale of electricity (*i.e.*, if it is "unbundled"), Section 201(b) gives the Commission, and not the States, jurisdiction over the interstate transmission service necessary to complete the sale. If, however, the transmission service is provided as part and parcel of the retail sale of electric energy (*i.e.*, if it is "bundled"), jurisdiction over the entire transaction, being a sale of energy made at retail, falls within the exclusive jurisdiction of the States. In each case, the States retain jurisdiction over the sale of energy and over local distribution. See FERC Br. in *TAPSG* 63-73.

d. Petitions seeking judicial review of various aspects of Order No. 888 were filed by representatives of virtually all segments of the electric utility industry. Those challenges were ultimately consolidated in the District of Columbia Circuit, where they are now pending. See note 1, *supra*. Among the issues raised in that appeal is the Commission's declaration that it has no jurisdiction over the interstate transmission component of bundled retail service. The curtailment provisions of Order No. 888 were not challenged.

3. In 1996, respondent Northern States Power Company (NSP), a public utility subject to the Commission's jurisdiction, filed a transmission tariff with the Commission to comply with Order No. 888. NSP's open access tariff filing incorporated the *pro rata* curtailment procedures specified in the *pro forma* tariff. In 1998, NSP made various filings under Section 205 of the Act, 16 U.S.C. 824d, proposing changes to its *pro*

forma open access transmission tariff. In particular, NSP sought to change the curtailment provisions of the tariff to establish a hierarchy under which some transmission customers would be curtailed before others.

The Commission rejected NSP's proposed curtailment provisions. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,098 (1998) (Pet. App. 12a-35a). The Commission explained that NSP had inadequately defined its proposed curtailment priorities and had failed to demonstrate that the proposed terms were consistent with, or superior to, the *pro forma* tariff terms required by Order No. 888. Pet. App. 23a-24a.

NSP then sought a declaration from the Commission that it would not be required to shed its native loads if, once NSP had exhausted all other options, there were still a need to reduce loads on facilities that were being used to serve both those native loads and NSP's third-party firm point-to-point transmission customers. The Commission denied that request. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,338 (1998) (Pet. App. 36a-41a). The Commission remained unpersuaded that it would be acceptable for NSP to curtail firm point-to-point transmission transactions without directing *pro rata* curtailments of transmission services for its native load. Pet. App. 40a. In other words, all firm transmission customers, whether native load or third-party, had to be treated comparably.

NSP then filed with the Commission an "emergency request for clarification, or rehearing and conditional motion for stay" of the orders. NSP claimed that the Commission lacked statutory jurisdiction to impose the curtailment provisions to the extent that they operated to override retail service obligations. NSP thus asked the Commission to clarify that its earlier orders rejecting NSP's tariff amendments should not be read to

apply the *pro forma* tarriff curtailment requirements to transmission service that NSP used to serve its bundled retail load.

In denying that last request, the Commission reiterated its earlier determination that, in providing service under the requirements of Order No. 888, NSP may not give preferential treatment to its native load when curtailing firm interstate transmission provided under the *pro forma* tariff. *Northern States Power Co.*, 84 F.E.R.C. ¶ 61,128, at 61,573 (1998) (Pet. App. 42a, 43a). While acknowledging that the FPA does not empower the Commission to regulate retail power sales, the Commission found no resulting jurisdictional problem, as the *pro forma* open access tariff implemented by Order No. 888 did no more than require that wholesale firm service transmission users be treated comparably to the transmission provider's native load customers, including retail customers. *Ibid.*

4. NSP petitioned for review of the Commission's orders. Agreeing with NSP, the Court of Appeals for the Eighth Circuit held that the Commission lacked jurisdiction to issue the orders under review.

The court first determined that this case involved a challenge not to Order No. 888 itself, but to the Commission's interpretation of Order No. 888 as applied to NSP's tariffs. Pet. App. 3a-4a.[2] The court then characterized the issue presented as "whether FERC may, through its tariff orders, require NSP, a public utility, to curtail electrical transmission to wholesale

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[2] The court rejected arguments that the petition should be dismissed as an improper collateral attack on Order No. 888, that the case should be transferred to the District of Columbia Circuit, and, alternatively, that the case should be held in abeyance pending the outcome of the omnibus appeal of Order No. 888 now before the D.C. Circuit. Pet. App. 3a-4a.

(point-to-point) customers on a comparable basis with its native/retail consumers when it experiences power constraints." Pet. App. 4a-5a. The court of appeals then accepted NSP's contention that, to the extent the Commission's orders obligated NSP to curtail its native/retail consumers on a *pro rata* basis with wholesale users, "NSP will be forced to provide interruptible service to its native/retail consumers" while the wholesale customer "has alternative sources from which to obtain continuous electrical supply." *Id.* at 6a.

The court then asked "whether FERC has the jurisdiction to affect the curtailment practices of NSP when dealing with NSP's native/retail consumers," and whether compliance with the Commission's "interpretation" of Order No. 888 would violate state regulatory laws. Pet. App. 6a, 9a. The Court assumed that when there is a curtailment of transmission service due to constraints, the interstate transmission customer would have alternatives while the retail customer would not—and that, despite contrary state requirements, the latter would be blacked out if not given a preference. *Id.* at 9a-10a. Based on that assumption, the court found that the Commission's orders "placed [NSP] between the proverbial rock and hard place" because, the court believed, NSP would have to act in violation of either a state requirement or Order No. 888. *Id.* at 10a.

Having thus found a conflict between state regulation of retail service and the Commission's regulation of interstate transmission, the court of appeals resolved the conflict in favor of state regulation. It reasoned:

> We think it obvious that the indirect effect of Order No. 888, as interpreted by the Commission, is an

> attempt to regulate curtailment of electrical power to NSP's native/retail consumers. Despite FERC's denial as to nonjurisdictional regulation, we find it has transgressed its Congressional authority which limits its jurisdiction to interstate transactions. As such, its attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC.

Pet. App. 11a. The court observed that the Commission had consistently and properly found in Order No. 888 that it had no jurisdiction to regulate retail sales. The court rejected the Commission's argument that, in the event of a clash between its curtailment requirement and state regulation, the federal regulation should prevail. The court reasoned that "the alleged discrimination [the Commission would prevent] is traceable to the nonjurisdictional sale of bundled service provided by NSP to the native/retail consumer rather than to the service provided to interstate customers." *Id.* at 7a-8a.

Subsequently, the court of appeals denied petitions for rehearing and suggestion of rehearing en banc filed by the Commission and others. Pet. App. 281a-282a.

5. On November 15, 1999, the Commission issued an order on remand to permit NSP's proposed curtailment procedures to go into effect. Pet. App. 44a-59a. In doing so, the Commission construed the court of appeals' order to address only "the implementation of curtailment over a transmission constraint after NSP has exhausted all of its network-native load generation redispatch options, and the firm point-to-point transmission customer whose firm service is being curtailed still has options with which to avoid having to shed

load." *Id.* at 48a; see also *id.* at 47a. The Commission directed NSP to file a new rate for transmission service to reflect the inferior quality of the service that would result from what would be non-*pro rata* curtailment. On November 19, 1999, NSP sought permission to withdraw its proposed tariff amendment, explaining that "actions taken by the Commission in other proceedings * * * have resolved the concerns that prompted the NSP requests for clarification and rehearing (and the resulting appeal)." *Id.* at 322a. On December 20, 1999, the Commission approved that request. Mot. to Vacate App. 1a-2a.

DISCUSSION

As petitioner observes (Mot. to Vacate 2), NSP's withdrawal of its tariff filing, combined with FERC's acceptance of that withdrawal, has rendered this case moot. Accordingly, the only question before this Court is whether to deny certiorari or, instead, to grant certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to dismiss respondent NSP's petition for review of the prior Commission orders as moot. We agree with petitioner that the decision below is wrong, albeit on the narrower of the grounds petitioner advances. In our view, however, the petition nevertheless should be denied. The Solicitor General has long taken the position on behalf of the United States that when a case becomes moot after the court of appeals ruled, the Court should decline to vacate the decision below if the case would not have warranted review in the absence of mootness. In this case, the Commission in its order on remand construed the Eighth Circuit's holding to have a relatively narrow scope, notwithstanding the court's flawed reasoning. Consistent with that construction

and the longstanding position of the United States when a case has become moot and certiorari is not warranted, we believe that certiorari and the motion to vacate should be denied.

1. It is important at the outset to distinguish between two different categories of cases: those that become moot before a court of appeals has rendered its judgment or after this Court has granted certiorari, and those that become moot after a court of appeals has issued its judgment but before this Court has acted on any petition for certiorari. In the former category of cases, a litigant has a *right* to further review that should not be frustrated by the "vagaries of circumstance." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). This Court has accordingly explained that, "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below," *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam), so long as the mootness does not result from the voluntary act of the party seeking appellate review, see *U.S. Bancorp Mortgage*, 513 U.S. at 25-27. Similar principles govern vacatur of a court of appeals decision when a case becomes moot after this Court has granted a petition for a writ of certiorari. See *ibid.*

That rationale for vacatur does not apply, however, where the case becomes moot *after* the court of appeals has entered final judgment and while a petition for a writ of certiorari is pending. A losing party has no right to Supreme Court review, which is discretionary and exercised circumspectly. See Sup. Ct. R. 10. Mootness during the pendency of a certiorari petition does not provide a basis for vacatur if the case would not otherwise have warranted review by this Court. If

the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-958 (1980). As a general rule, where the judgment would not otherwise have been reviewed by this Court, vacatur would disserve the public interest by eliminating a judicial precedent that our judicial system regards as "presumptively correct," see *U.S. Bancorp Mortgage*, 513 U.S. at 26, and would give the petitioner a windfall that it would not have received if the controversy had remained live.

Accordingly, the long-standing position of the United States has been that, when a case becomes moot while a petition for certiorari is pending, the petition should be denied if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900) (U.S. *Velsicol* Br.).[3] Although this Court has never expressly endorsed that standard, the Court has denied certiorari in a number of such cases (including *Velsicol* itself) and has thus decidedly not adopted a policy of automatically vacating the lower court decision whenever a case has become moot while a certiorari petition was pending. Cf. Mot. to Vacate 3

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[3] Accord U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) (per curiam) (No. 92-1123); Reply Br. at 6, *Keough* v. *American Policyholders Ins. Co.*, 510 U.S. 1040 (1994) (No. 93-320); U.S. Br. as Amicus Curiae Supporting Petitioner at 8-9 n.6, *U.S. Bancorp Mortgage Co., supra* (No. 93-714); U.S. Br. in Opp. at 10-14, *Cuban Am. Bar Ass'n* v. *Christopher*, 516 U.S. 913 (1995) (No. 95-84); U.S. Mem. in Opp. at 3 n.1, *Yankton Sioux Tribe* v. *United States*, 120 U.S. 322 (1999) (No. 99-34).

(suggesting otherwise). To the contrary, the Court "has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari." Robert Stern et al., *Supreme Court Practice* 724 & n.29 (7th ed. 1993) (footnote omitted).[4]

2. Applying that rule here, we believe that the motion to vacate and the certiorari petition should be denied, because the decision below would not, in the end, have warranted review by this Court if the case had not become moot.

a. The analysis is somewhat complicated because we agree with petitioner that the decision below is incorrect. As an initial matter, the court of appeals erroneously assumed, without any record basis, that the Commission's orders created a federal-state conflict by forcing NSP to black out its retail customers to ensure service to its wholesale customers. Pet. App. 5a-6a. The Commission's orders, however, simply barred NSP from using its interstate electric transmission system to favor its own customers at the

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[4] Petitioner relies (Mot. to Vacate 3) on a passage in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in which this Court stated that "[t]he established practice of the Court in dealing with a civil case * * * which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. As discussed in the text, however, the Court's actual practice, at least in recent years, has been to the contrary in the circumstances presented here. And, in *U.S. Bancorp Mortgage*, this Court (albeit in a different context) "refus[ed] to be bound by [*Munsingwear*'s] dicta" concerning this Court's supposed "established practice." 513 U.S. at 23-24.

expense of the other customers to whom it provides firm interstate transmission service. In themselves, therefore, those orders did not unambiguously subject NSP to the conflicting state and federal obligations about which the court of appeals was concerned, and it was inappropriate for the court to vacate the Commission's orders on the theory that they might someday be applied to do so.

Moreover, the court erred in its narrow view of the Commission's statutory jurisdiction. Under the decisions of this Court and of the District of Columbia Circuit in *Conway Corp.* v. *FPC*, 510 F.2d 1264 (1975), aff'd, 426 U.S. 271 (1976), FERC has plenary authority to regulate transactions within its jurisdiction even when the exercise of that authority affects other transactions within the regulatory jurisdiction of the States. See 510 F.2d at 1271-1272; 426 U.S. at 272; see also *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 509 (1989); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); cf. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986). We agree with petitioner (Pet. 18-19) that the decision below is difficult, if not impossible, to reconcile with that principle. FERC may validly take measures to ensure equal treatment for a utility's firm, jurisdictional transmission customers even if those measures may incidentally affect the terms on which the utility provides service to its retail customers.

There is no merit to the court of appeals' efforts to distinguish *Conway* on the ground that "the alleged discrimination is traceable to the nonjurisdictional sale of bundled service provided by NSP to the native/retail consumer rather than to the service provided to interstate customers." Pet. App. 7a-8a. By its terms, Order No. 888 focuses on interstate transmission

service solely under FERC's jurisdiction. In contrast, the principal case on which the court of appeals relied in attempting to distinguish *Conway—Altamont Gas Transmission Co.* v. *FERC*, 92 F.3d 1239 (D.C. Cir. 1996), cert. denied, 520 U.S. 1204 (1997)—involved a FERC-imposed condition in a pipeline certificate proceeding specifically requiring the pipeline's intrastate affiliate to change its state-regulated rates. *Altamont* is simply inapposite here, because FERC has made no attempt to exercise power over interstate service in a concerted effort "to induc[e] a change of state policy" in a matter explicitly reserved to the States. See *id.* at 1246-1248.

b. Even though we agree with petitioner that the decision below is incorrect, we did not file our own petition for a writ of certiorari to review the Eighth Circuit's decision. In fact, before the certiorari petition was filed by petitioner Enron, the Commission had concluded that the Eighth Circuit's decision could be narrowly construed and had issued the order on remand, described above (see pp. 10-11, *supra*), which embodied the Commission's narrow reading and application of the Eighth Circuit's decision. It was only then that respondent NSP sought to withdraw its proposed tariff. As those circumstances demonstrate, we believe that this case would not have been an appropriate vehicle for this Court's review even if it had not become moot.

Against this background, we are not prepared at this point to endorse petitioner's arguments about the practical significance of the decision below. Petitioner contends (Pet. 21-24) that the decision would threaten the Commission's efforts to remedy undue discrimination and protect the national supply of electricity, including its efforts under Order No. 888. But the court

focused narrowly on the jurisdictional consequences of the Commission's application of that order in rejecting NSP's tariff filings. Pet. App. 11a. In its order on remand, the Commission construed the court's decision to apply only in "narrowly circumscribed factual circumstance[s]" involving "the implementation of curtailment over a transmission constraint after [a utility] has exhausted all of its network/native load generation redispatch options, [where] the firm point-to-point transmission customer [whose firm service is being curtailed] still has options with which to avoid having to shed load." *Id.* at 47a; see also *id.* at 48a-49a, 321a-324a. Petitioner may disagree with the Commission's narrow interpretation of the court's decision, but any such disagreement would illustrate why, even if the case had not become moot, this Court would have benefited from further development of the law before granting review in this area.

Second, petitioner's principal, and broadest, jurisdictional argument (see Pet. 15-18), which the Commission rejected in Order No. 888, is pending before the D.C. Circuit on review of that Order. It is unlikely that this Court would have granted certiorari in this case to review the same argument while those parallel proceedings are pending.

Specifically, petitioner claims that, under *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and *Mississippi River Transmission Corp.* v. *FERC*, 969 F.2d 1215 (D.C. Cir. 1992), the FPA's specific grant of authority over interstate transmission should be construed to authorize FERC "to regulate *all* interstate transmission of electricity, including the interstate transmission of electricity as part of a sale to retail customers"—and therefore to regulate curtailment even as to retail service. Pet. 14; see also Pet. 15-

18. In the proceedings culminating in Order No. 888, however, the Commission determined that its direct jurisdiction extends to interstate transmission service used for retail sales only if that service is unbundled from those sales. See Order No. 888-A, *supra*, at 30,226; FERC Br. in *TAPSG* 71-73. The Commission expressly disclaimed direct jurisdiction over a utility's interstate transmission where the utility provides its retail customers with power and transmission on a bundled basis, because (the Commission reasoned) transmission in those circumstances is part and parcel of a retail sale left to the jurisdiction of the States. *Ibid.*

Petitioner disagrees, and that disagreement is one of the issues before the District of Columbia Circuit on review of Order No. 888. Whatever may be the merit of petitioner's arguments on that point, however, *this* case, with its narrow focus, would not have been an appropriate vehicle for addressing those arguments even if the case had not become moot. That is especially so since one of petitioner's central arguments for seeking certiorari (see Pet. 15-18) was that the decision below conflicts with the District of Columbia Circuit's own decision in *Mississippi River*.

3. Petitioner correctly observes (Mot. to Vacate 4) that it "did not in any way cause or contribute to the mootness of this matter." As this Court held in *U.S. Bancorp Mortgage*, *supra*, a party's lack of responsibility for the mootness of an adverse court of appeals decision is often a necessary condition for any motion to vacate that decision as moot. But it does not follow that it is also a *sufficient* condition. Whatever their origin, the developments that make a case moot after the court of appeals has rendered its judgment should not ordinarily place the losing party (or a third party) in a *better* position than it would have occupied if those

developments had not arisen and the case had not become moot.

That, however, is essentially the result that petitioner seeks here. Under petitioner's approach, the post-judgment developments that made this case moot would entitle petitioner to vacatur of the judgment even though (as discussed above) we do not believe that certiorari would have been warranted if those developments had never occurred. Of course, if this Court disagrees with us on that point, then it should vacate the decision below. Indeed, because we agree with petitioner that the decision below is erroneous (albeit not on the more expansive of the grounds petitioner advances (see Pet. 15-18)), we have considerable sympathy for petitioner's desire to have the decision below vacated so as to eliminate any possibility that it will lead to the broadly adverse consequences petitioner fears—especially since it was respondent NSP's own withdrawal of its own proposed tariff that led to the mootness. But if this Court agrees with our assessment as to whether certiorari would have been warranted in the absence of mootness, the petition for a writ of certiorari, as well as the motion to vacate, should be denied.

CONCLUSION

The petition for certiorari and the motion to vacate should be denied.

Respectfully submitted.

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